No. 89-1432

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

WAYNE P. JACKSON,

Petitioner,

v.

JOHNSTOWN/CONSOLIDATED REALTY TRUST and TRUSTEES OF CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND,

Respondents.

BRIEF OF RESPONDENT TRUSTEES OF CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Illinois Appellate Court have adequate and independent state law grounds for its conclusion that a foreclosure sale conducted by a court appointed commissioner, rather than by a sheriff, is not void?

2. May Petitioner seek review of a judgment prescribing that a foreclosure sale be conducted by a court appointed commissioner rather than by a sheriff, where Petitioner has consented to that judgment and it has caused him no injury?

3. May a bankruptcy court, acting pursuant to 11 U.S.C. § 105, enter an order, agreed to by the debtor, which directs the debtor and its creditors to submit to a state court an order of foreclosure on debtor's property which prescribes that a commissioner, rather than a sheriff, shall conduct the foreclosure sale?

LIST OF PARTIES

The parties to the proceeding in the court whose judgment is sought to be reviewed are correctly identified in the Petition For A Writ Of Certiorari. In accordance with Rule 24.2 of the Rules of the Supreme Court, a list of those parties is omitted here.

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OPINION BELOW

The opinion below is correctly cited in the Petition For A Writ Of Certiorari. In accordance with Rule 24.2 of the Rules Of The Supreme Court, the citation for that opinion is omitted here.

JURISDICTION

Petitioner purports to invoke the jurisdiction of this Court under 28 U.S.C. §1257(a). As set forth in the argument section of this brief, this Court in fact lacks jurisdiction over this case because, without limitation, the decision below was based on adequate and independent state grounds and because Petitioner has suffered no injury and consequently lacks standing.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

In addition to the Constitutional provisions cited by Petitioner, this case also involves the supremacy clause of the United States Constitution, Art. VI, cl. 2, which provides in relevant part, ". . . the Laws of the United States . . . shall be the supreme Law of the Land; . . .".

In addition to the Illinois constitutional and statutory provisions cited by Petitioner, the case also involves the following Illinois statutes. The first is Ill. Rev. Stat., ch. 110, ¶15-1506(f)(3) which provides, in relevant part, that a party may request a foreclosure judgment to name "an official or other person who shall be an officer to conduct the sale . . ." The second is Ill. Rev. Stat., ch. 110, ¶15-1506(f)(6) which provides, in relevant part, that a judgment of foreclosure may authorize "fees to be paid out of the [foreclosure sale] proceeds to an auctioneer. . .".

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STATEMENT OF THE CASE

It is necessary to amplify Petitioner Jackson's Statement of the Case as follows:

A. The Property and Petitioner's Interest

The real estate involved in this case is a commercial office building, commonly known as the Heyworth Building, located at 29 East Madison Street in Chicago (the "Property"). (CO5).[1] Prior to foreclosure, legal title to the

[1] References are to the record in the Illinois Appellate Court.

Property was held in two Illinois land trusts.[2] The land was owned by LaSalle National Bank as land trustee (the "LaSalle Land Trust"). (CO3-05). The building and other improvements on the land were owned by American National Bank and Trust Company of Chicago as land trustee (the "American Land Trust"). (*Id.*).

Prior to foreclosure, 29 East Madison Associates, an Illinois limited partnership (the "Jackson Partnership"), held 100% of the beneficial interest and power of direction in the American Land Trust. (C373A; C374-379; C606). Petitioner Wayne P. Jackson is the sole general partner of the Jackson Partnership. (Petition, at 4). Both the American Land Trust and the Jackson Partnership were, of course, parties to the Foreclosure and Bankruptcy cases, which are discussed presently.

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[2] Professor Henry Kenoe states, "... the distinctive features of the [Illinois] land trust may be summarized as follows:

> 1. Both legal and equitable title [to the land] are vested in the trustee, and the beneficiary has no interest in either. ...
>
> 2. The trustee has no duties or powers other than to convey, mortgage or deal with the real estate as directed by the beneficiaries or to sell or liquidate the property at the termination of the trust. ...
>
> 3. The rights of possession, management, control and operation of the property, as well as the right to rents, issues, profits and proceeds of sale or mortgage financing are vested in the beneficiary. ...
>
> 4. The rights, privileges and obligations of the beneficiaries are not interests in real estate but are expressly characterized as personal property."

Kenoe On Land Trusts, sec. 1.3, p. 1-5 (Ill. Inst. For CLE, 1989) [citations omitted].

B. The Foreclosure Case

As of January 3, 1986, there were three mortgage liens on the Property. Respondent Trustees Of The Central States, Southeast And Southwest Areas Pension Fund (the "Fund") held the first mortgage. (CO3-04; CO9-30). Lincoln National Pension Insurance Company ("Lincoln") held the second mortgage. (CO3). Respondent Johnstown/Consolidated Realty Trust ("JCRT") held a third mortgage. (C90-111). These three mortgages secured more than $12 million in debt. (C610). On January 3, 1986, the Fund filed a complaint to foreclose its mortgage in the Circuit Court of Cook County Chancery Division (the "Illinois Trial Court"), *Trustees Of Central States Southeast and Southwest Areas Pension Fund v. LaSalle National Bank and Trust Company As Trustee, et al.*, Case No. 86 CH 0003 (the "Foreclosure Case").

C. The Bankruptcy Case

On February 13, 1986, the Jackson Partnership filed a voluntary debtor's petition under Chapter 11, Title 11, United States Code, *In Re 29 E. Madison Associates*, Case No. 86 B 2240 (the "Bankruptcy Case"), in The United States Bankruptcy Court For The Northern District of Illinois (the "Bankruptcy Court"). Promptly thereafter, the Fund, JCRT and Lincoln moved pursuant to 11 U.S.C. §362(d) to have the automatic stay modified so that the Foreclosure Case could proceed. On April 28, 1986, these efforts resulted in the entry of an Agreed Order Modifying the Automatic Stay (the "Agreed Bankruptcy Order"). (Copy Found at C444-452). The Agreed Bankruptcy Order was consented to by the Fund, by JCRT, by Lincoln, by James F. Graves ("Graves") (the sole limited partner of the Jackson Partnership), and by the Jackson Partnership itself. (C484).

Among other things, the Agreed Bankruptcy Order set forth the terms of an Agreed Order Of Foreclosure for the judicial sale of the Property. The Agreed Bankruptcy Order required the parties, including the Jackson Partnership, to submit the Agreed Order Of Foreclosure to the Illinois Trial Court if the Jackson Partnership and Graves failed to procure a third party purchaser within sixty days. (C475-477). Ultimately, the Jackson Partnership and Graves did not satisfy the deadline and could not persuade Bankruptcy Judge Eisen to extend it. (C722-808).

D. Entry of the Agreed Foreclosure Judgment

On June 13, 1986, the Illinois Trial Court entered an Agreed Order for Judgment of Foreclosure and Sale and Default Judgment (C605-617) ("Agreed Foreclosure Judgment"). At the same time, the Jackson Partnership stipulated to the entry of the Agreed Foreclosure Judgment, agreeing to be added as a named party to the foreclosure proceedings, and waived its answer to the Fund's and JCRT's complaints. (C429-430). The Jackson Partnership also filed an appearance in the foreclosure case. (C414). The Agreed Foreclosure Judgment was substantially the same as that called for in the Agreed Bankruptcy Order. (C605-617).

E. The Sale Procedure

The Agreed Bankruptcy Order and the Agreed Foreclosure Judgment required a judicial sale of the Property on July 7, 1986. (C614). In accordance with those orders, a commissioner was appointed by the Illinois Trial Court to take bids on the Property in the courtroom of Bankruptcy Judge Eisen in the Dirksen Building in Chicago. (C614).

F. The Judicial Sale

Pursuant to the Agreed Foreclosure Judgment, the commissioner caused public notice of the judicial sale to be published and posted in accordance with Illinois statutes. (C638; C829-832). On June 28, 1986, a Notice of Public Sale was filed with the Illinois Trial Court and served on all parties of record. (C618-622). Over JCRT's objection, the sale was continued several times. Each time, the requisite Notice of Postponement was filed with the Illinois Trial Court, served on all parties of record and posted by the appointed commissioner. (C614-618; C639-41; C829). The sale finally occurred on July 24, 1986. (C829).

In Judge Eisen's Court, on the record, the commissioner first offered the Property in parcels, and receiving no such bids, offered the Property in its entirety. (C829-832; C942-973). JCRT was the only bidder at $10.4 million. (C829-832). JCRT's bid was subject to over $500,000 in unpaid real estate taxes and the $3 million Lincoln mortgage which, under the Agreed Foreclosure Judgment, was not foreclosed. (C613-617). Accordingly, JCRT's successful bid had an economic value of at least $13.9 million.

G. Confirmation of the Sale and Subsequent Disposition of the Property

On August 15, 1986, JCRT, Lincoln and the Fund jointly moved the Illinois Trial Court to confirm the July 24th judicial sale. (C828). After several evidentiary hearings, the sale was confirmed on September 3, 1986. (C982; C988). Based on undisputed appraisal testimony, the Illinois Trial Court held that JCRT's bid at the judicial sale realized the fair market value of the Property. (Transcript of Proceedings, 8/15/86, Volume III, at pp. 1-5 (Supplemental Record)). The Illinois Trial Court also found that there was no evidence of fraud or irregularity in the judicial sale.

(Transcript of Proceedings, 9/3/86, at pp. 52-55 (Supplemental Record)). No appeal was ever taken from the confirmation of the sale.

On December 23, 1986, JCRT sold the Property to a third-party purchaser for less net proceeds than JCRT had paid at the judicial sale. JCRT also lost money in the resale of the Property because it paid $579,610 in past due 1984 real estate taxes and $584,303 in principal and interest on the Lincoln mortgage that was not foreclosed. Additionally, JCRT gave the third-party purchaser a credit against the purchase price for payment of 1986 real estate taxes. (C1162-63).

H. Petitioner's Collateral Attacks on the Judicial Sale

On December 16, 1986, Petitioner filed in The Illinois Trial Court his Petition to Set Aside Order Confirming Sale and to Void the Commissioner's Sale ("Petition To Set Aside Order"). (Supplemental Record). Petitioner delayed that filing for over three months after confirmation of the judicial sale and for over eight months after the procedure was made part of the Agreed Bankruptcy Order. The sole basis of this Petition was a collateral attack that the foreclosure sale was void because it was held in a bankruptcy judge's courtroom on federal property. (*Id.*). After JCRT and the Fund filed motions to dismiss (C1005; C1008-1018), Petitioner abandoned this theory.

On January 15, 1987, Petitioner filed in the Illinois Trial Court his Amendment To Petition To Set Aside An Order Confirming Sale, To Void Commissioner's Sale, And To Void a Portion Of The Judgment Of Foreclosure (the "Amended Petition"). (C1125-1129). This Amendment came only after JCRT had closed a sale of the Property to a third-party purchaser. The Amended Petition maintained that the foreclosure sale was void because it had been

conducted by a commissioner rather than by a sheriff. Petitioner maintained that the Illinois Constitution prohibited the appointment of a commissioner.

I. Decisions Below

On March 31, 1987, after full briefing by the parties (C1005-24; C1136-61; C1173-1251; C1252-59), and hearing argument of counsel (Transcript of Proceedings, 3/23/87 (Supplemental Record)), the Illinois Trial Court denied the Amended Petition. (C1262; Transcript of Proceedings, 3/31/87 (Supplemental Record)). The Illinois Appellate Court affirmed. 185 Ill.App.3d 734, 542 N.E.2d 30 (1989). Among other things, the Appellate Court ruled that even if the appointment of a commissioner was beyond the statutory authority of the Illinois Trial Court, the error was not jurisdictional. 185 Ill.App.3d at 737, 542 N.E.2d at 32. Hence, the order was not void, as Petitioner contended but was, at most, voidable under *state* law principles, and therefore not subject to collateral attack. *Id.* As a completely alternative basis for its decision, the Illinois Appellate Court also held that the Bankruptcy Court had the authority to enter an agreed order requiring a foreclosure sale to be conducted by a commissioner. 185 Ill.App.3d at 738, 542 N.E.2d at 32. The Illinois Supreme Court denied leave to appeal on December 5, 1989. The instant petition for a writ of certiorari ("Petition") followed.

SUMMARY OF ARGUMENT

First, at the threshold, the decision of the Illinois Appellate Court rests on adequate and independent state grounds, viz., that in Illinois the conduct of a foreclosure sale by a commissioner is not void. Petitioner makes *no* claim that the conduct of a mortgage foreclosure sale by a commissioner violates the laws or Constitution of the United

States, and it is a well established principal of Federalism that this Court does not review decisions based on adequate and independent grounds of state law.

Second, and still at the threshold, Petitioner may not attack the Agreed Foreclosure Judgment: (a) because he agreed to it; and (b) because he demonstrates no injury to him from entry of that judgment. This Respondent knows of no case where certiorari has been granted to review an agreed order which did not harm the petitioner.

Finally, contrary to Petitioner Jackson's position, this case does not present any conflict with *Butner v. United States*, 440 U.S. 48 (1979) ("*Butner*"). While *Butner* stands for the proposition that "[p]roperty *interests* are created and defined by state law", 440 U.S. at 55 (emphasis added), it does not preclude a federal bankruptcy court from fashioning an agreed remedy which resolves a pending motion to lift the automatic stay by providing adequate protection to secured creditors.

ARGUMENT

I.

THE DECISION BELOW WAS BASED ON ADEQUATE AND INDEPENDENT STATE GROUNDS

A. The State Law Issues And Their Adequate State Law Resolution

The validity of the Agreed Foreclosure Judgment was resolved by the Illinois Courts on adequate state law grounds independently of applying any federal considerations. The first state law issue is whether a sale conducted by a commissioner is void. The resolution—that the sale is not void—was decided entirely on grounds of state law. The key

passage of the Illinois Appellate Court decision is as follows and it contains not a shred of federal jurisprudence:

> "Petitioner asserts, pursuant to *Factor*, that the sale was void because the trial court lacked statutory authority to appoint a commissioner. However, even if the trial court lacked statutory authority to appoint a commissioner, the error would not be jurisdictional. The error would result in a voidable judgment and would not, therefore, be the proper subject of a collateral attack. *Stark v. Stark* (1955), 7 Ill.App.2d 442, 444; *Phillips v. O'Connell* (1947), 331 Ill.App. 511, 528-29.
>
> "The case at bar is analogous to the situation in *Phillips v. O'Connell* (1947), 311 Ill.App. 511. In *Phillips*, a belated objection was made to the appointment of a special commissioner on the grounds that the trial court lacked statutory authority to refer chancery matters to a special commissioner. The appellate court held that the trial court properly had jurisdiction of the subject matter and the parties and that the improper reference resulted in a proceeding that was voidable at most. We, therefore, find that the trial court did not err in finding that the appointment of a commissioner to take bids at the sale in question did not result in a void proceeding."

185 Ill.App.3d at 737-38, 542 N.E.2d at 32.[3]

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[3] In fact, legislation has since established that conduct of a foreclosure sale by a commissioner is more than merely not void, it is affirmatively proper. The new Illinois Mortgage Foreclosure Law, Ill. Rev. Stat. ch. 110, ¶ 15-1101 *et seq.* (1987), came into effect shortly after the foreclosure sale at issue here, provides that a compensated special officer may perform the ministerial duty of selling real estate. Section 15-1506(f)(3) states that a party may request that a judgment name "an official or *other person* who

Having decided entirely on state law grounds that the agreed foreclosure judgment was not void (but was merely voidable), the Illinois Appellate Court then decided, the second state law issue, viz., whether to vacate the judgment. The Court's decision not to vacate the judgment relies exclusively on Illinois jurisprudence and is devoid of federal considerations:

> "The trial court, after finding that the order of June 13, 1986, was not void, also concluded that petitioner did not meet the requirements of section 2-1401 [of the Illinois Code of Civil Procedure] to have the order vacated on equitable grounds. A section 2-1401 petition invokes the court's equitable power to vacate a judgment attended by unfair, unjust or unconscionable circumstances and it is incumbent on the petitioner to show that his meritorious defense was diligently brought to the court's attention. *City of Chicago v. Central National Bank* (1985), 134 Ill.App.3d 22, 25.
>
> "We are in agreement with the trial court that petitioner failed to diligently protect his alleged rights. Since the order was entered with petitioner's consent, the motion to vacate was not raised until 6 months after its entry, and petitioner objected to confirmation of the sale on other grounds, we find that the trial court did not err in denying petitioner's petition to set aside the order

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shall be the officer to conduct the sale. . . ." (emphasis added). Moreover, ¶ 15-1506(f)(6) provides that a judgment of foreclosure may authorize "the fees to be paid out of the sale proceeds to an auctioneer, if any, who shall have been authorized to conduct a public auction sale." In short, the very procedure that Petitioner attacks in this case is now unambiguously authorized by Illinois statute as not conflicting with the Illinois Constitution.

> confirming the sale and voiding the commissioner's appointment."

185 Ill.App.3d at 738-39, 542 N.E.2d at 32-33. In sum, the decision below was clearly based on adequate state law grounds.

B. This Court Does Not Review Decisions Based On Adequate And Independent State Law Grounds

Beginning at least with *Murdock v. Memphis*, 20 Wall. 590, 636 (1874), it has long been the clear and unbroken policy of this Court not to review matters decided on state grounds, even when the state court may have alternatively based its decision on a misruling of federal law:

> "We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion."

Herb v. Pitcairn, 324 U.S. 117, 126 (1945). More recently, this Court has said:

> "Had the Ohio Court rested its decision on both state and federal grounds, either of which would have been dispositive, we would have no jurisdiction."

Zacchini v. Scripps-Howard Broadcasting Company, 433 U.S. 562, 568 (1977).

Petitioner seeks to avoid this conclusive barrier to review by maintaining that "the State Court's interpretation of state law has been influenced by an erroneously broad interpretation of federal law." Petition at 14. Petitioner thereby both misapprehends this Court's criterion for review and misapprehends the reasoning and ruling of the Illinois Appellate Court. The criterion for review by this Court is

not one of "influence"; it is whether the state ground "is so interwoven with the other [federal ground] as not to be an independent matter[.]" *Enterprise Irrigation Dist. v. Farmers Mut. Canal Co.*, 243 U.S. 157, 164 (1917). See also *Oregon v. Kennedy*, 456 U.S. 667, 671 (1982); *Ake v. Oklahoma*, 470 U.S. 68, 75 (1985). This Court has said that "... when the adequacy and independence of any possible state law ground is not clear from the face of the opinion" it will accept review, but "[i]f the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate and independent grounds, we, of course, will not undertake to review the decision." *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983).

In the instant case, it is crystal clear from the Appellate Court's opinion that the state law decision is bona fide, separate, adequate and independent. The Appellate Court determined as a matter of state law that the foreclosure sale was not void, and should not be vacated. The Appellate Court discussed apposite state law, citing and analyzing four Illinois decisions[4] plus section 2-1401 of the Illinois Code of Civil Procedure. Only after reaching its holding *solely* on its basis of such state law, did the Appellate Court move on to consider any federal issue.

Consequently, certiorari should be denied because the decision below was based on adequate and independent state grounds.

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[4] *Factor v. Factor*, 27 Ill.App.3d 594, 327 N.E.2d 396 (1st Dist. 1975); *Stark v. Stark*, 7 Ill.App.2d 442, 129 N.E.2d 776 (1st Dist. 1955); *Phillips v. O'Connell*, 331 Ill.App. 511, 73 N.E.2d 864 (1st Dist. 1947); *City of Chicago v. Central National Bank*, 134 Ill.App. 3d 22, 479 N.E.2d 1040 (1st Dist. 1985).

II.

PETITIONER MAY NOT ATTACK THE AGREED FORECLOSURE JUDGMENT

A. Petitioner May Not Attack A Judgment To Which He Agreed

The instant controversy is predicated on the alleged invalidity of a foreclosure sale procedure to which the Jackson Partnership expressly consented. Petitioner relegates to a footnote his excuse for continuing to pursue this litigation, claiming that "erroneous stipulations of law may be set aside". Petition at 13, n. 4. But that misstates the issue. The real issue is whether Petitioner may collaterally attack a mutually fashioned remedy upon which the Fund and other creditors relied in relinquishing valuable rights.

Petitioner's conduct is similar to that which was condemned by the United States Court of Appeals for the Seventh Circuit in *Citation Cycle Co., Inc. v. Yorke,* 693 F.2d 691 (7th Cir. 1982). In that case, the parties put before Bankruptcy Judge Thomas James a stipulation stating that no facts were in dispute and placing before him the single legal issue as to when a certain creditor's lien on goods arose. This, in turn, would determine when (not whether) an act of bankruptcy had been committed, and would have important consequences for creditors. The bankruptcy judge proceeded to decide when the lien had arisen. *See* 693 F.2d at 692-693. Subsequently, the bankrupt collaterally attacked the judge's ruling by maintaining that it had never committed an act of bankruptcy at all so that the whole case had been invalidly commenced, and that the judge, in turn, lacked authority to have decided when the lien arose. The Court of Appeals stated:

> "Estoppel 'arises * * * when one has so acted as to mislead another and the one thus misled has relied

> upon the action of the inducing party to his prejudice.' [citation omitted]
>
> "Citation's stipulation estops it to raise the issues now comprehended in this appeal. Citation had represented to Judge James that the only issue he had to decide was when an Illinois judgment ripens into a lien .... The creditors too were entitled to rely, and clearly did rely, on the fact that, however much this litigation resembled trench warfare, at least the one stipulated issue decided by Judge James in December of 1977 was settled." [footnote omitted].

See 693 F.2d at 695-696.

In this case, the Fund, as well as the other creditor parties to the Agreed Bankruptcy Order, relied on the consent of the Jackson Partnership to all its provisions. A material component was the provision to hold a foreclosure sale of the Property in a stated manner should the Jackson Partnership fail to sell the Property within a stated time. In exchange for that benefit, the creditor parties detrimentally relinquished a panoply of rights and remedies under Title 11 of the United States Code, including, without limitation: the right to seek appointment of an examiner and/or a trustee (11 U.S.C. § 1104); the right to seek a conversion of the case to a Chapter 7 case (11 U.S.C. § 1112); the right to seek a sale or offering for sale of the Property through the bankruptcy court (11 U.S.C. §§ 363(b) and 363(f)); and the right to seek an immediate and complete termination of the automatic stay (11 U.S.C. § 362(d)).

Accordingly, just as the parties' stipulation equitably estopped the appellant from collaterally attacking the proceedings in the *Citation Cycle* case, so Petitioner's participation in the Agreed Bankruptcy Order equitably estops him from invoking the review and aid of this Court. *See also In*

re Reliable Mfg. Corp., 17 B.R. 899, 904 (N.D. Ill. 1981) *aff'd* 703 F.2d 996 (7th Cir. 1983) ("A party is estopped from asserting that a transaction which it freely entered and benefitted from does not now bind it because of its invalidity"); *Handler v. SEC*, 430 F.Supp. 71 (C.D. Cal. 1977), *aff'd* 610 F.2d 656 (9th Cir. 1979) (corporate directors who voted for consent decree were estopped from complaining of effects of report of special counsel provided for in the decree). Therefore, certiorari should be denied.

Petitioner's tardy collateral attack with its utterly nebulous implication that Petitioner was somehow harmed is similar to an appellant's position which the Illinois Appellate Court rejected in another foreclosure case as follows:

> "Appellants did not raise the alleged collusion issue in their original motion to vacate the decree. The argument made in this court makes out a nebulous case of collusion at best, and appeals to the equitable powers of this court to affirm their position. Balancing these factors against the oft-stated position of the Supreme Court that, as a matter of public policy, stability should be given to judicial sales, it is our conclusion that the order of the circuit court dismissing the petition to vacate and denying leave to file an amended complaint should be affirmed."

Uptown Federal Savings and Loan Association Of Chicago v. Walsh, 15 Ill.App.3d 626, 633-34, 305 N.E.2d 74, 80 (1st Dist. 1973). While not framed as an estoppel case, *Uptown* rightly emphasizes the importance of finality in foreclosure sales—an equity which is entirely in Respondents' favor in the instant case and which requires that certiorari be denied.

B. Petitioner Was Not Injured By The Judgment.

The most curious feature of Petitioner's dogged pursuit of appellate relief in Illinois and in this Court is that he never alleges (much less shows) how he was injured because a foreclosure sale was conducted by a commissioner rather than by a sheriff. No meaningful contention has ever been advanced that a higher sale price would have been realized if a sheriff had conducted the sale; indeed, the Illinois Trial Court heard extensive evidence that the sale was fair and that no higher or better offer existed.[5] Accordingly, on this record, it is clear that Petitioner has suffered no injury, and therefore lacks standing.

Moreover, there is no showing how the relief requested by Petitioner would provide redress. Yet this Court has emphatically stated:

> "... at an irreducible minimum, Art. III requires the party who invokes this court's authority to 'show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant,' ... and that the injury 'fairly can be traced to the challenged ac-

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[5] Illinois law is clear that if the sale was fair, it need not be re-held just because a slightly higher price may be obtained "... it is a firmly established rule that unless there is evidence of mistake, fraud or violation of duty by the officer conducting the sale, mere inadequacy of price alone is not sufficient cause for setting aside a judicial sale.... It is the policy of the law to give stability and permanency to judicial sales." *Illini Federal Savings and Loan Association v. Doering,* 162 Ill.App.3d 768, 771, 516 N.E.2d 609, 611 (5th Dist. 1987) (citations omitted). Of course, in the instant case, there is not even any evidence suggesting that a higher price really could have been obtained if the sale had been conducted by a sheriff.

> tion' and 'is likely to be redressed by a favorable decision'. . . ." [Citations omitted].

Valley Forge Christian College v. Americans United For Separation of Church and State, Inc., 454 U.S. 464, 472 (1982). Moreover, even though Jackson self-righteously protests the alleged illegality of having had a commissioner conduct a foreclosure sale,

> "This Court has repeatedly held that an asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court."

Allen v. Wright, 468 U.S. 737, 754 (1984). Consequently, certiorari must be denied for the simple and fundamental reason that Petitioner was never injured and therefore lacks standing to confer jurisdiction on this Court.

III.

THE DECISION BELOW DOES NOT CONFLICT WITH THIS COURT'S HOLDING IN *BUTNER*

After analyzing §105(a) of the Bankruptcy Code, the Illinois Appellate Court concluded that "the appointment of a commissioner pursuant to the agreed bankruptcy order entered by the Federal bankruptcy court was valid even if the Illinois Constitution were to be construed so as to prohibit the appointment of a commissioner in these circumstances." *See* 185 Ill.App.3d at 738, 542 N.E.2d at 32.

Petitioner Jackson erroneously maintains that such holding conflicts with *Butner v. United States*, 440 U.S. 48 (1979). In *Butner*, this Court considered whether federal law should afford a mortgagee a security interest in rents of a bankrupt, even if state law would not recognize that interest until after foreclosure. *See* 440 U.S. at 53. This Court concluded that property *interests* are created and

defined by state law, 440 U.S. at 55, and that state law should always be followed in determining the mortgagee's security interest in rents. However, while *Butner* may defer to state law in determining a party's interests in property, it does not preclude a bankruptcy court from taking appropriate steps to protect and enforce those interests. Indeed, in the *Butner* decision itself, Justice Stevens suggested that a bankruptcy court could take steps to sequester rents in which a mortgagee's interest might not be perfected at state law. *See* 440 U.S. at 57.

Butner actually had a narrow holding. "The Supreme Court held only that a bankruptcy court must look to state law to determine a mortgagee's interest." *In re Gotta*, 47 B.R. 198, 201 (Bankr. W.D. Wisc. 1985). Nothing done in the instant case in any way contravenes that principle. In the instant case, the substantive rights of the mortgagees in property were at all times determined in accordance with Illinois state law. All that happened was that the Bankruptcy Court (with the consent of all affected parties in this case) exercised its equitable powers to implement a remedy protecting the mortgagee's state law interests in property. Such action by the Bankruptcy Court is expressly authorized by § 105(a) and § 361(3) of the Bankruptcy Code, and in no way violates *Butner*.

Section 105(a) of the Bankruptcy Code provides, in relevant part, that "[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." Among the provisions of "this title" (Title 11) are those requiring adequate protection of the interests of secured creditors.[6] Adequate protec-

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[6] "Adequate protection" refers to the preservation of the value of a secured creditor's lien or security interest throughout the pendency of a bankruptcy case. The requirement that secured

tion includes "granting such other relief . . . as will result in the realization by [the creditor] of the indubitable equivalent of [its] interest in such property." 11 U.S.C. § 361(3). Consequently, the bankruptcy court's ability to require that a state court foreclosure be conducted by a commissioner flows naturally from its plenary powers under § 105 and § 361(3) of the Bankruptcy Code to adequately protect the economic interests of creditors. Indeed, the need for bankruptcy courts to be able to fashion remedies which protect the state law interests of creditors in property is a primary purpose of § 105(a) of the Bankruptcy Code. *See, In re Feit & Drexler, Inc.*, 760 F.2d 406, 415 (2d Cir. 1985) (§ 105(a) provides bankruptcy court with broad power to achieve goal of protecting interests of the creditors and of the debtor).

The propriety of appointing a commissioner to conduct a foreclosure sale follows from the fact that § 105 is often employed in ways which demonstrably supersede state law. For example, § 105(a) has been employed to enjoin creditors from pursuing substantive state remedies. In *MacArthur Company* v. *Johns-Manville Corp.*, 837 F.2d 89 (2d Cir. 1988), *cert. denied* 109 S.Ct. 176 (1989) the bankruptcy court was found to have the power to enjoin suits against the debtor's products liability insurer as part of the bankruptcy court's approval of a settlement between the debtor and that insurer. *See also In re Davis*, 730 F.2d 176 (5th Cir. 1984). *A fortiori*, the decision in *Butner* does not preclude the Bankruptcy Court in the instant case from having issued an

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creditors' interests be adequately protected is grounded in the fifth amendment's protection of property interests. *See, Wright v. Union Central Life Ins. Co.*, 311 U.S.. 273 (1940); *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935). *See also, In re Murel Holding Co.*, 75 F.2d 941 (2d Cir. 1935) (per Hand, J.).

agreed order which provided for the mere substitution of a commissioner for a sheriff to act as auctioneer for a foreclosure sale.

Petitioner's premise that a bankruptcy court cannot supersede a state remedy is quite mistaken. In its broadest sense, the entire Bankruptcy Code is a creditor's remedy providing for a distributive mechanism which overrides state law. Nor is there any question that such a legislative scheme is valid under the bankruptcy clause (Article I, § 8, clause 4) of the United States Constitution which empowers Congress "to establish . . . uniform laws on the subject of bankruptcy throughout the United States" and under the supremacy clause (Article VI, clause 2) of the United States Constitution which provides in relevant part: "the Laws of the United States . . . shall be the supreme Law of the Land; . . .". See *Elliott v. Bumb*, 356 F.2d 749, 755 (9th Cir. 1966) *cert. denied*, 385 U.S. 829 (1966) ("If state law is contrary to federal bankruptcy law, the state law must yield") (citing bankruptcy and supremacy clauses of the Constitution); *Rhodes v. Stewart*, 705 F.2d 159, 163 (6th Cir. 1982) *cert. denied* 464 U.S. 983 (1983) (state and federal legislatures shared concurrent authority to promulgate bankruptcy laws, but the supremacy clause and the doctrine of preemption will invalidate state promulgations inconsistent with federal law).

Consequently, the general supremacy of the Bankruptcy Code is well established, and there is nothing in the *Butner* decision which limits the remedial powers of the bankruptcy court to afford adequate protection under the provisions of Bankruptcy Code § 361(3) and § 105, once it has been established that a creditor is secured under state law. Therefore, the decision of the Illinois Appellate Court in no way contravenes this Court's decision in *Butner*. Rather, the Illinois Appellate Court correctly recognized

that under undisputed principals of supremacy and preemption, the Bankruptcy Court could fashion a remedy requiring that a foreclosure sale be conducted by a commissioner even if, *arguendo*, state law in and of itself did not authorize the appointment of such a commissioner. Accordingly, no substantial issue is presented and certiorari should be denied.

Finally, a suppressed premise of Petitioner's argument is that he has an "interest in property" under state law to have a foreclosure sale conducted by a sheriff rather than by a commissioner. The characterization of a particular aspect of foreclosure procedure as an "interest in property" is unfounded. Petitioner's actual complaint is in the nature of an alleged violation of due process because of the manner in which the foreclosure sale was conducted. But Petitioner has never raised a state or federal due process issue; nor can he, for the Illinois Appellate Court found that "there are no allegations of fraud in the sale proceedings," 185 Ill.App.3d at 737, 542 N.E.2d at 32, and the Illinois Trial Court concluded that the sale price was fair after it heard extensive evidence. Consequently, this case actually presents no real issue under *Butner*.

CONCLUSION

Certiorari should be denied in this case for each and every of four reasons: (1) the decision below was based on adequate and independent state grounds; (2) Petitioner may not seek review because he agreed to the judgment for which he seeks review and was not injured by it; (3) the decision below does not conflict with this Court's decision in *Butner v. United States.*

Respectfully Submitted,

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